

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

R.W. and R.J.T., husband and wife, and the
marital community composed thereof,

Plaintiffs,

v.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY, dba Liberty Mutual

Defendant.

NO. CV 16-465 RAJ

**PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT RE BREACH
OF CONTRACT**

**Note on Motion Calendar:
June 3, 2016**

Plaintiffs bring the following motion. They also ask that the Court use their initials in all orders issued in this matter because Plaintiffs have been victims of a stalker in prior years. Federal district court orders often become available on the Internet through a variety of sources. Plaintiffs wish to protect the privacy of their identities and their address.

I. RELIEF REQUESTED

Plaintiffs respectfully request that the Court find, as a matter of law, that Liberty Mutual breached the contract when it agreed there was coverage for a dishwasher leak but denied coverage for all mold caused by the leak in excess of \$5,000, which is contrary to Washington's "efficient proximate cause" rule of insurance contract interpretation.

II. INTRODUCTION

Plaintiffs are homeowners who suffered a dishwasher leak that was covered under the

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT RE BREACH OF CONTRACT — I

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1 insurance contract for up to \$429,500 in damage. They immediately notified their insurer, Liberty
 2 Mutual, who sent a mitigation contractor called Rainbow International to clean up the water, dry
 3 out the house, and prevent mold growth. Unfortunately, Rainbow International was unable to
 4 prevent mold growth and mold spores were spread throughout the house via the HVAC system. It
 5 was estimated that cleaning the mold damage would cost approximately \$49,929. While appliance
 6 leaks were covered under the contract, other provisions of the contract excluded mold damage.
 7 Another provision allowed limited mold coverage in an amount not to exceed \$5,000. On that
 8 basis, Liberty Mutual denied coverage for all mold damage in excess of \$5,000.

9 Liberty Mutual's decision violated Washington's efficient proximate cause rule. That rule
 10 provides that when a covered cause of loss sets in motion another loss in an unbroken chain of
 11 events, both losses are covered even if the final cause would otherwise be excluded from
 12 coverage. Liberty Mutual circumvented the efficient proximate cause rule by excluding mold and
 13 placing a \$5,000 cap on mold damage, but Washington courts have ruled that an insurance
 14 contract may not circumvent the efficient proximate cause rule. The interpretation of insurance
 15 contracts is a question of law, which courts may resolve through summary judgment.

16 III. FACTS

17 On March 9, 2014, Plaintiffs' residence had a dishwasher leak that flooded underneath
 18 their kitchen floor and went into their basement. (Declaration of R.W. at ¶ 3.) Plaintiffs promptly
 19 notified Liberty Mutual of the leak. (R.W. Decl. ¶ 4.) Plaintiffs had an insurance contract with
 20 Liberty Mutual and it is undisputed that water damage caused by a leaking appliance, such as the
 21 dishwasher, was covered. The contract language stated:

22 COVERAGE A - DWELLING and
 23 COVERAGE B - OTHER STRUCTURES
 24 We insure against risks of direct loss to property described in Coverages A
 25 and B only if that loss is a physical loss to property[.]

(Declaration of Joel Hanson, Exhibit A, at page 6 of 20.) This broad provision established that all possible sources of physical damage were covered unless they were explicitly excluded. This form of insurance contract is commonly referred to as an ‘all risk’ policy.¹ Nowhere does the insurance contract exclude sudden water leaks.² Further, the contract clarified that household appliance leaks were covered:

If any of these cause water damage not otherwise excluded from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which this water escaped.

(Hanson Decl. Ex. A, at page 7 of 20.) (Emphasis added.) Liberty Mutual agreed the water damage caused by the dishwasher leak was covered. (R.W. Declaration ¶ 5.) On June 20, 2014, Liberty Mutual employee Charles Blackburn double-checked the contract and confirmed that “Coverage for sudden and accidental water damage due to failure of dishwasher is covered under the policy.” (Hanson Decl. Ex. B.)

The water damage caused by the dishwasher leak was extensive. Liberty Mutual ultimately paid approximately \$68,672 to Plaintiffs for the cost of repairing structure damage caused by the water. (Hanson Decl. Ex. C.)

¹ “‘All Risk’ insurance is a promise to pay upon the fortuitous and extraneous happening of loss or damage from any cause whatsoever unless that cause is specifically excluded. Under an all risk policy, any risk that is not specifically excluded is an insured peril.” *Frank Coluccio Const. Co. v. King Cty.*, 136 Wn. App. 751, 767, 150 P.3d 1147, 1155 (2007) (citations omitted).

² The contract does contain an exclusion for hidden water seepage that occurs over the course of “weeks, months, or years”, but that exclusion does not apply here because the dishwasher leak was sudden and discovered immediately.

1 In addition to the direct water damage, mold began to grow within 48-72 hours of the
 2 dishwasher leak. (*See* Hanson Decl. Ex. D at page 12.) (*See also* R.W. Decl. ¶ 8-9.) This is a
 3 typical problem with water damage to a home. (*See* Hanson Decl. Ex. D at page 6.) Liberty
 4 Mutual sent Rainbow International to dry-out the water and mitigate the damage. (R.W. Decl. ¶
 5 6.) Plaintiffs were frustrated with Liberty Mutual's and Rainbow International's handling of the
 6 mold damage.³ (R.W. Decl. ¶ 6-19.)

7 The mold spread throughout the house and needed extensive remediation. (R.W. Decl. ¶ 8-
 8 19.) (*See also* Hanson Decl. Ex. D.) Liberty Mutual estimated that remediating the mold damage
 9 would cost \$4,252 for the laundry room and \$38,326 for other rooms in the house. (Hanson Decl.
 10 Ex. C.) Later, Plaintiffs' contractor, Ted Sitterley of Belfor, estimated the mold damage would
 11 cost \$49,929 to remediate. (Hanson Decl. Ex. E at page 20.) This was well within the insurance
 12 contract's limit of \$429,500 for structure damage. (Hanson Decl. Ex. A at Policy Declarations
 13 page.)

14 On January 19, 2015, about ten months after the dishwasher leak, Liberty Mutual sent a
 15 letter stating that it would not pay any more than \$5,000 towards the cost of remediating the mold
 16 damage. (Hanson Decl. Ex. C.) Liberty Mutual explained:

17 Unfortunatly, we are unable to pay for all the covered mold remediation
 18 due to the limits of the policy.

19 (Hanson Decl. Ex. C.) The subject insurance contained an exclusion for mold. The contract
 20 stated:

21
 22 ³ For the purpose of this motion, Plaintiffs are not asking the Court to assign blame for any failure
 23 to prevent the mold damage. Instead, Plaintiffs are asking the Court to find that the mold damage
 24 was fully covered because it was proximately caused by the covered dishwasher leak.

We insure against risks of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

...

2. caused by:

...

(3) smog, rust, mold, wet or dry rot;

(Hanson Decl. Ex. A at page 6-7 of 20) Despite this exclusion, the contract provided some minimal coverage for mold. The insurance contract had an "endorsement" (i.e. amendment) which allowed coverage of \$5,000 for mold damage. (Hanson Decl. Ex. A at "Amendatory Mold . . . Endorsement".) That endorsement also included an additional exclusion for mold:

12. Except as provided by Additional Coverage 9., loss consisting of or caused by "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus" is excluded, even if resulting from a peril insured against under Section I. We do not cover "Remediation" of "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus," even if resulting from a peril insured against under Section I, except as provided by Additional Coverage 9.

(Hanson Decl. Ex. A at "Amendatory Mold . . . Endorsement".)

There is evidence that the spread of mold was exacerbated by the actions of Rainbow International during its efforts to remediate that damage. (R.W. Decl ¶ 8-19.) Liberty Mutual did not deny coverage for any negligent acts by Rainbow International. (R.W. Decl. ¶ 7 and 15.) For example, Liberty Mutual agreed to pay for a door that Rainbow International accidentally broke. (R.W. Decl. ¶ 7.) The failure or negligence of a vendor conducting remediation was covered by

1 the subject contract because it resulted in a “physical loss”.⁴ Nevertheless, Liberty Mutual refused
 2 to pay more than \$5,000 for any mold damage arising from the dishwasher leak.

3 As argued below, it is Plaintiffs’ position that the mold exclusion and \$5,000 limit is
 4 unenforceable because it is an attempt to circumvent Washington’s “efficient proximate cause”
 5 rule. Accordingly, the full \$429,500 limit should have been applied to the mold damage and it
 6 breached the contract when Liberty Mutual capped the payment for mold remediation at \$5,000.

7 After Liberty Mutual refused to pay for the cost of remediating the mold damage,
 8 Plaintiffs were unable to move back into their house. (R.W. Decl. ¶ 19.) The empty house
 9 attracted transients who stole items and lived inside. (*Id.* at ¶ 20.) The transients caused a fire and
 10 a new dispute arose over whether Liberty Mutual would authorize the cost of repairing the fire
 11 damage and the continued damage caused by returning transients. (*Id.* at ¶ 20-22.) Preliminary
 12 estimates indicate that repairing the fire damage will cost well in excess of \$200,000. (Hanson
 13 Decl. Ex. F.)

14 IV. ARGUMENT

15 A. Standard for Summary Judgment on Insurance Contracts

16 A party is entitled to summary judgment if “there is no genuine issue as to any material
 17 fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.
 18 56(a). In determining whether an issue of fact exists, the Court must view the evidence and draw
 19 reasonable inferences from the evidence in the light most favorable to nonmoving party.
 20 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *United States v. Johnson*
 21 *Controls, Inc.*, 457 F.3d 1009, 1013 (9th Cir. 2006). To avoid summary judgment, the
 22

23
 24 ⁴ “We insure against risks of direct loss to property described in Coverages A and B only if that
 25 loss is a physical loss to property”. (Hanson Decl. Ex. A at page 6 of 20.)

1 nonmoving party must “set forth specific facts showing that there is a genuine issue for trial.”
2 Fed. R. Civ. P. 56(e).

3 Washington law provides that interpretation of an insurance contract is a question of law.
4 *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002). Accordingly, the
5 contractual dispute addressed in this motion can, and should, be resolved by the Court on
6 summary judgment.
7

8 **B. General Standards for Interpreting Insurance Contracts**

9 Insurance policies must be “liberally construed in favor of a policyholder or beneficiary
10 thereof, whenever possible, and strictly construed against the insurer in order to afford the
11 protection which the insured was endeavoring to secure when he applied for the insurance.”
12 *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 64 Wn. App. 838, 855, 827 P.2d 1024 (1992),
13 aff'd, 126 Wn.2d 50, 882 P.2d 703 (1994). The purpose of insurance is to insure, and the
14 contract should be construed so as to make it operative rather than inoperative. *Phil Schroeder,*
15 *Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983). A construction which
16 contradicts the general purpose of the contract or results in a hardship or absurdity is presumed
17 to be unintended by the parties. *Id.* The terms of an insurance policy are construed as the
18 average person buying insurance would interpret them, and are given a fair and reasonable
19 construction. *Overton*, 145 Wn.2d at 424. Where a policy is ambiguous on an issue, that
20 ambiguity must be construed in favor of the insured. *Panorama Vill. Condo. Owners Bd. of*
21 *Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001).
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C. Under the Efficient Proximate Cause Rule, the Mold Was Fully Covered Because the Dishwasher Leak Was the Proximate Cause of the Entire Claim

It is indisputable that the covered dishwasher leak set mold growth in motion. Liberty Mutual decided that the resulting mold growth was excluded except for \$5,000. But this is not how insurance coverage operates in Washington. As the Washington Supreme Court has explained:

We first judicially adopted the so-called “efficient proximate cause rule” in 1983:

Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the “proximate cause” of the entire loss.

It is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events.

Allstate Ins. Co. v. Raynor, 143 Wn.2d 469, 479, 21 P.3d 707, 709 (Wash. 2001) (finding that a murder-suicide was not a covered claim because it was not a proximate cause of a dispute over raising rabbits). The Washington Supreme Court has further explained, “The efficient proximate cause rule applies only where two or more independent forces operate to cause the loss.” *Kish v. Ins. Co. of N. Am.*, 125 Wn. 2d 164, 170, 883 P.2d 308, 311 (1994). Here, the covered peril of a dishwasher leak set in motion the mold growth. Accordingly, the leak was the proximate cause of the entire loss, including the mold growth, and that entire loss was fully covered under the contract.

Another way of looking at the efficient proximate cause rule is to examine the “primary” or “predominant” cause of the loss. Some courts have looked to the “primary” cause when applying the efficient proximate cause rule. *See, e.g., Safeco Ins. Co. of Am. v. Hirschmann*, 112

Wn. 2d 621, 631, 773 P.2d 413, 418 (1989) (“Here, the record unequivocally indicates that the “primary” cause of Hirschmann’s loss was the covered perils of wind and rain.”) Other decisions have used the term “predominant” cause to articulate the efficient proximate cause rule. *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wash. 2d 533, 538, 656 P.2d 1077, 1081 (1983) (“It is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events.”); *see also, e.g., Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn. 2d 501, 519, 276 P.3d 300, 309 (2012) (“The efficient proximate cause rule applies only when two or more perils combine in sequence to cause a loss and a *covered peril* is the predominant or efficient cause of the loss.”) (finding that coverage for collapse existed despite exclusion for deficient design or faulty workmanship because collapse was the predominant cause of the loss).

Here, the predominant and primary cause of the damage in this matter was the dishwasher leak. That leak was covered and, under the efficient proximate cause rule, the mold caused by that leak was also covered.

D. The Mold Exclusion Did Not Apply Here Because Washington Law Overrides Contracts that Circumvent the Efficient Proximate Cause Rule

Liberty Mutual may argue that the two exclusions for mold, and the provision providing a limit of \$5,000 for mold damage, are sufficient to circumvent the efficient proximate cause rule. But under Washington law, an insurer may not use contractual language to circumvent the efficient proximate cause rule:

[W]e are presented with the identical question in *Villella*: whether by drafting variations in exclusionary clause language an insurer may circumvent the “efficient proximate cause” rule of *Graham* and deny coverage when a covered peril sets in motion a causal chain the last link of which is an excluded peril. The lesson of *Villella* is that the rule may not be circumvented.

1 *Hirschmann*, 112 Wn. 2d at 627, 773 P.2d at 416. In that case, the Washington Supreme Court
 2 found that landslide damage was covered because it was proximately caused by rainfall despite
 3 the existence of a contractual exclusion for landslides resulting from a covered loss.⁵ Another
 4 informative case is *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn. 2d 501, 519, 276
 5 P.3d 300, 309 (2012). In that case, the collapse of a concrete slab caused by faulty workmanship
 6 was found to be covered despite the existence of an exclusion for faulty workmanship. Coverage
 7 existed because collapse was not an excluded peril.

8 Under *Hirschmann*, Liberty Mutual was not allowed to circumvent the efficient proximate
 9 cause rule by relying on the contractual exclusions for mold. It is indisputable that the dishwasher
 10 leak was covered and proximately caused the mold to grow. Accordingly, the mold damage was
 11 also covered. The mold exclusions are superseded by the coverage for the leak and the full
 12 insurance limit of \$429,500 should be applied to the entire loss.

13 As a matter of law, Liberty Mutual should be found to have breached the insurance
 14 contract when it refused to cover more than \$5,000 of the mold damage caused by the dishwasher
 15 leak.

16 **E. To the Extent that Rainbow International Accidentally Exacerbated the Mold**
 17 **Damage, that Was Also Covered**

18 There is evidence that Rainbow International's attempt to mitigate the mold damage may
 19 have exacerbated that damage. Liberty Mutual did not deny coverage on this basis. Liberty

21 ⁵ *Hirschmann* does not mean that every claim must be covered. For example, Washington law
 22 favors the insurer if the proximate cause of the loss is an excluded peril. *Findlay v. United Pac.*
 23 *Ins. Co.*, 129 Wn. 2d 368, 375, 917 P.2d 116, 120 (1996) (distinguishing *Hirschmann* because
 24 "[i]n this case, the proximate cause of the loss was a named, excluded peril.")

1 Mutual agreed that damage caused by Rainbow International was generally covered, but applied
2 the \$5,000 limit to the mold damage.

3 Even if Liberty Mutual were to change its position, and argue that damage accidentally
4 caused by Rainbow International should not be covered, that new position would be incorrect. As
5 discussed above, the insurance contract was an "all risk" contract that covered the risk that a
6 vendor might damage the property while attempting to mitigate the damage of a covered loss.
7 There was no exclusion in the contract for such an event.

8 V. CONCLUSION

9 Washington law precludes attempts by insurers to circumvent the efficient proximate
10 cause rule. This case is a good example of why the efficient proximate cause rule has been
11 established. In general, mold damage is likely to occur whenever there is a severe leak and
12 whenever there is a fire that requires substantial water to extinguish it. If, when purchasing the
13 insurance contract, Plaintiffs had asked their insurance agent whether a dishwasher leak would be
14 covered, the agent would have looked at the contract and told them "yes". But Liberty Mutual has
15 attempted to circumvent that coverage by excluding the mold damage. Here, this circumvention
16 made it impossible for Plaintiffs to move back into their house and ultimately led to a fire that
17 was caused by transients living in the empty house. All of this could have been avoided if Liberty
18 Mutual had fully covered the damage caused by the dishwasher leak.

19 Under Washington law, the dishwasher leak and mold damage was fully covered. Liberty
20 Mutual breached the contract when it wrongfully denied payment for the full cost of the mold
21 damage.

1 DATED this 12th day of May, 2016.

2 JOEL B. HANSON, ATTORNEY AT LAW, PLLC

3
4 /s/ Joel Hanson

5 Joel B. Hanson, WSBA #40814
6 Attorney for Plaintiffs
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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT RE BREACH OF CONTRACT — 12

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UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

Under penalty of perjury under the laws of the State of Washington, I declare that on this
12th day of May, 2016, I electronically filed the foregoing with the Clerk of the Court using the
CM/ECF system with which will send notification of such filing to the following:

John M. Silk, WSBA #15035
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